# No. 15,394

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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BRUCE G. BARBER, District Director, Immigration and Naturalization Service,

*Appellant,*

vs.

KURT RIETMANN,

*Appellee.*

**On Appeal from the United States District Court for the Northern District of California.**

## APPELLANT'S REPLY BRIEF.

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## Table of Authorities Cited

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Since the filing of appellee's brief, two cases having important bearing upon this appeal have been considered and decided by appellate courts:

*Lehmann v. U. S. ex rel. Carson,* by the Supreme Court, 353 U.S. 685;

*Paris v. Shaughnessy,* by the Court of Appeals for the Second Circuit, decided July 2, 1957, ..... F.2d .....

Appellant in his opening brief has called the Court's attention to the provisions of Section

212(a)(22) of the 1952 Immigration and Nationality Act, wherein Congress provided that aliens who are ineligible to citizenship, except aliens seeking to enter as *non-immigrants,* shall be excluded from admission into the United States. The previous existing Section 13(c) of the 1924 Act, which permitted such alien ineligible to citizenship to be admitted as a *non-quota* immigrant was thus *specifically* changed. Appellee in his reply contends that Section 405(a) saves to him "a status as resident alien enabling him to depart the United States on temporary business abroad and return even though he was ineligible to citizenship." Appellee concedes that the 1952 Act does not specifically provide such non-excludable status. (Brief, p. 7.) It is his contention that it was necessary for Congress to have specifically provided that the provisions of Section 212(a)(2) shall be effective "notwithstanding" the terms of the savings clause in order to take such provision outside the terms of the savings clause. Appellee cited *United States ex rel. Carson v. Kershner,* 228 F.2d 142, in support of his contention and particularly italicized the following quotation: "It was held in the Shomberg case that such intent is clear where it is specifically provided that a provision shall be effective 'notwithstanding' the terms of the savings clause." The Supreme Court granted certiorari in *Lehmann v. U. S. ex rel. Carson,* 353 U.S. 915, and on June 3, 1957 held the Court of Appeals in error and reversed its judgment, 353 U.S. 685.

The following paragraph is quoted from page 689 of the opinion of the Court:

"Thus, even if we assume that respondent has a 'status' within the meaning of Section 405(a), that section by its own terms does not apply to situations 'otherwise specifically provided' for in the Act. Section 241(a)(1) specifically provides for the deportation of an alien who 'at the time of entry was . . . excludable by the law existing at [that] time,' and Section 241(a)(4) specifically provides for the deportation of an alien who 'at any time after entry' has been convicted of two crimes involving moral turpitude. And Section 241(d) makes Sections 241(a)(1) and 241(a)(4) applicable to all aliens covered thereby, 'notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.' It seems to us indisputable, therefore, that Congress was legislating retrospectively, as it may do, to cover offenses of the kind here involved. This case is, therefore, 'otherwise specifically provided' for within the meaning of Section 405(a). The Court of Appeals was in error in holding to the contrary, and its judgment is reversed."

The case of *Paris v. Shaughnessy,* 138 F. Supp. 36, has been cited to the Court as reaching a decision contrary to the decision of the District Court below herein. On July 2, 1957, the Court of Appeals for the Second Circuit, in *Paris v. Shaughnessy,* No. 137, October term 1956, Docket No. 24017, ..... F.2d ....., affirmed the judgment of the District Court. Paris, similarly to appellee herein, had voluntarily made application to be relieved from liability from training

and service in the Armed Forces and in so doing debarred himself from becoming a citizen of the United States. Prior to the effective date of the Immigration and Nationality Act of 1952, he could depart from the United States as a visitor abroad and reenter legally. *Paris* last departed the United States on August 15, 1953. When he entered the United States on September 15, 1953, the Immigration and Nationality Act of 1952 was in effect. Under Section 212(a)(22), he was an excludable alien. His contention was that the provisions of Section 405(a), the savings clause of the 1952 Act, applied to him and that Section 212(a)(22) was therefore inapplicable. The Court held:

> "But Paris misreads Section 405(a). His pre-existing status of non-deportability would have remained unchanged unless the 1952 Act otherwise specifically provided. Section 212(a)(22) of that Act does so otherwise specifically provide. Cf. Lehmann v. U.S. ex rel. Carson, decided June 3, 1957, 353 U.S. 685. Mulcahey v. Catalanotte, decided June 3, 1957, 353 U.S. 692."

It is respectfully submitted that the Court below is in error and its judgment should be reversed.

Dated, San Francisco, California,
August 15, 1957.

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